***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

75-2019

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES ex rel. THOMAS MUNGO,

Appellant,

-against-

J. EDWIN LaVALLEE, Superintendent
of Clinton Correctional Facility,

Appellee.

----------X

# BRIEF FOR APPELLEE

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UNITED STATES COURT OF APPEALS
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## Table of Contents

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## Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York (Costantino, J.) dated March 20, 1974 denying an application for a writ of habeas corpus. United States ex rel. Mungo v. LaVallee, 372 F. Supp. 742.

## Questions Presented

1. Did the identification procedure at the police precinct violate due process?

2. Was there probable cause for appellant's arrest?

3. Has appellant exhausted state remedies on his fruit of the poisonous tree claim?

## Prior Proceedings

On November 30, 1967, at a term of the Supreme Court, Kings County (Starkey, J.) appellant was convicted of the crimes of robbery in the first degree, grand larceny in the first degree and assault in the second degree by the verdict of a jury. On February 28, 1968, he was sentenced to concurrent terms of 15 to 20 years on the robbery count, 5 to 20 years on the larceny count and 2 1/2 to 10 years on the assault count. The judgment of conviction was affirmed by the Appellate Division, Second Department, 34 A D 2d 736. Leave to appeal to the New York Court of Appeals was denied. On January 25, 1968 at a term of the Supreme Court, Kings County (Damiani, J.) appellant was convicted of the crimes of possession of weapons and dangerous instruments and appliances as a felony (two counts) by the verdict of a jury. On March 5, 1968 he was sentenced to state prison as a second felony offender to a term of 3 to 14 years, the sentence to run concurrently with the sentence imposed on February 28, 1968. The judgment of conviction was affirmed by the Appellate Division, Second Department 34 A D 2d 616 and by the New York Court of Appeals 28 N Y 2d 540. At both of these trials* appellant Mungo who is Black was tried together with his co-defendant D'Ambra who is White.



* Numerals in parenthesis refer to the page numbers of these trials.

The witness Leonard Monteleone was employed by New York Telephone Company to collect the money out of pay telephones. On January 3, 1967 at 2:30 p.m. he removed the coins from telephones in a factory located at 1301 Gravesend Neck Road. As Monteleone opened the door in order to exit from the factory a Negro was standing outside in the doorway, and the witness bumped him with the door. Monteleone obtained a front face view of the Black man (15; 24). The encounter was about four or five seconds (15-16). The witness said "excuse me" and walked to the truck parked in front of the factory (15; 89). The Negro came up alongside of Monteleone (15). The witness looked at the Black person (16). The Negro had his hand in his pocket, put his hand up against the witness' side and ordered him into the truck. As the witness went into the truck he saw the front face of the White person who was also entering the truck (25). Monteleone was told to lay down in the back and his hands were tied. Shortly thereafter the robbers stole the money which the witness had been collecting from the pay telephones and the keys which were used to open them.

The witness saw the face of the White person for about five seconds and the face of the Negro about the same amount of time (126). He gave a description of the White fellow to the police artist (159). Concerning the Negro he said that

he "had a picture of him in his mind of what he looked like but I couldn't describe him" [to the police artist] (133; 158); that if he saw him again he would recognize him (158). All that he could say to the police artist about the Negro was that he was dark (42).

The witness told Detective Guiney that the Negro was about 6 feet, 200 pounds, 40 years old, wore a trooper type hat with ear muffs and a tan overcoat (130-132; 167), and that the White person was about 25 to 30 years old, about 5 feet 10 inches, 150 or 160 pounds, had dark eyes, and wore dark rimmed glasses, a gray fedora hat and a gray tweed coat (130; 167).

On January 14, 1967 Patrolman Edward Obarowski received an alarm telephone communication on the radio of his car about the highjacking of a truck. Three perpetrators were seen entering a blue 1966 Plymouth with plate number 6 Z 7514 and leaving the scene in that car (5-6). The officer saw the blue car with three occupants in it (7). The plate number was similar to the one about which he received the information on the alarm (8; 35). Mungo and D'Ambra and a third person were in the vehicle which was stopped at an intersection. Mungo was in the driver's seat. D'Ambra was exiting from the vehicle (226-227). Based on the information received in the

alarm he believed that they were the perpetrators of the alleged highjacking (9). The patrolman ordered the occupants out of the car and they came out. Thereafter he felt underneath the seat with his hand (76) and he found a revolver under the driver's seat and another gun under the seat on the passenger's side. Both guns were fully loaded* (10).

The patrolman took them to the sixty second precinct. There he found in D'Ambra's pocket two keys (227). These were two of the keys taken from Monteleone by the robbers. Also he found a gray fedora and another hat behind the rear seat of the automobile (230-232).

On the same day Detective Guiney called Monteleone and requested him to come to the police precinct where the witness was placed in a room with a two way mirror. The witness saw two White persons and one Black person. When he first looked at them without the hats on they looked a little familiar but he was not sure (21; 135). Hats were placed on D'Ambra and Mungo, and then he recognized them** (146-147). At



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* The state trial judge found that the police had probable cause to believe that a felony had been committed by appellant (45-46) and denied the motion to suppress the weapons.

** Also, on January 14, 1967, D'Ambra had been wearing eye glasses (235) and glasses were placed on him (21; 136).

that time the witness was sure of his identification (43; 147). Also he saw the two men at a hearing in Criminal Court. On both these occasions he was sure that they were the robbers (10-11; 44; 150). At the time of the trial in November of 1967, he could no longer be sure.

Monteleone recalled that the Negro was dark (42) and had a little fuzz on his chin, but he could not recall whether he had a mustache (137). Mrs. Rothenberg who saw the Negro at the time of crime said that he had a mustache around the mouth and around the chin (281). At the viewing and at the trial Mungo had a mustache (244; 251).

Monteleone said that the Negro put something up against his ribs as he ordered the witness into the truck (115). Mrs. Rothenberg saw the Black man put a gun to Monteleone's side (278).

The state court noted that Monteleone saw the robber when the Negro bumped into him and said "Excuse me"; that when the witness was led into the truck by the Negro he turned and looked at him and had more of an opportunity to observe him (289); that according to the witness the identification at the station house was a positive identification (290); that the

ones whom he identified on January 14, eleven days after the crime were the defendants (290); that the witness was a young man with good vision and of unusual capacity (291-292); that he had a mental picture of the Negro but he could not reduce it to a description for the artist (292) and that the identification was not based on or tainted by potentially misleading circumstances (290).

## POINT I

### THE CONFRONTATION PROCEDURE AT THE POLICE PRECINCT DID NOT VIOLATE DUE PROCESS.

The state court correctly denied the motion to dismiss the proceeding. Monteleone positively identified Mungo at the police precinct as one of the perpetrators of the crime. An identification by one person is in itself sufficient evidence to go to a jury and does not per se violate due process. United States v. Holley, 502 F. 2d 273, 274 (4th Cir. 1974); Neil v. Biggers, 409 U.S. 188 (1972).

The procedure followed by the police at the stationhouse did not violate due process. Both robbers wore hats. The hat placed on Mungo's head was found in the car which he was driving. It has been recognized that requiring a suspect to wear an article of clothing similar to what was worn by the

perpetrator at the time of the crime is not "unnecessarily" or "impermissibly" suggestive within the meaning of Stovall v. Denno, 388 U.S. 293, 302 (1967) and Simmons v. United States, 390 U.S. 377, 384 (1968). See United States v. Ball, 381 F. 2d 702, 703 (6th Cir. 1967), cert. denied 390 U.S. 962 ("All that happened here was that Ball was placed in the lineup and required to wear his own jacket"); Caruso v. United States, 406 F. 2d 558, 559 (2d Cir. 1969) (" ... in the presence of the bank employees he was required to put on a ski type hood which one of the robbers had dropped as he fled the bank ... requiring a suspect to wear an article of clothing does not violate due process" [citations omitted]); Harris v. Turner, 466 F. 2d 1319, 1324 (10th Cir. 1972) ("We do not think that under the facts and circumstances shown in this case with respect to Harris, it was error to require him to wear the same clothes in the lineup that he was wearing when the offense was committed."); United States ex rel. Anderson v. Mancusi, 413 F. 2d 1012, 1014 (2d Cir. 1969) ("Although one trucker said that the red shirt 'stood out like a neon sign', it does not appear that this had an unduly suggestive effect on the witness."); United States v. Gaines, 450 F. 2d 186, 195 (3rd Cir. 1971), cert. denied 405 U.S. 927 (" ... the District Judge acceded to the government's request that a scarf be placed around part of Mr. Gaine's face, whereupon Miss Griffith positively identified him.").

When the witness Monteleone bumped into the Negro with the door he obtained a front face view of the man. He saw his face for about four or five seconds. Also, as Monteleone walked towards the truck the Negro came up alongside of him at which time the witness looked at him again. Although Monteleone could not describe the Negro to the police artist, he had a picture of him in his mind. Eleven days after the crime, he looked at the Black person and the White person through a two way mirror at the police precinct. When hats were placed on their heads he recognized them. Monteleone was a young man with good vision and unusual capacity. The witness testified that at the precinct and again at a subsequent hearing in criminal court he was sure of his identification of Mungo as the Black robber. The state trial court ruled that the identification did not violate due process within the meaning of Stovall v. Denno, 388 U.S. 293 (1967), and its ruling should be respected. Great weight must be accorded to the findings of the state trial judge who saw and heard the witness. United States ex rel. Cannon v. Montanye, 486 F. 2d 263, 267 (2d Cir. 1973); United States ex rel. Phipps v. Follette, 428 F. 2d 912, 915 (2d Cir. 1970); United States v. Mims, 481 F. 2d 636, 637 (2d Cir. 1973).

## POINT II

### THERE WAS PROBABLE CAUSE FOR APPELLANT'S ARREST.

Patrolman Edward Oburowski had probable cause for believing that a felony had been committed by Mungo. The officer saw a blue car with three occupants in it. The alarm telephone communication received on his radio spoke of three perpetrators of a highjacking of a truck leaving the scene in a blue 1966 Plymouth. The plate number which the officer saw on the blue car was similar to the one described in the alarm. The officer believed that Mungo who was driving the car, and D'Ambra and a third person in the car were the perpetrators of the alleged highjacking. This Court has recognized that there is probable cause for arresting a person who fits the description of the perpetrator of a crime as set forth in a radio alarm. See United States ex rel. Wilson v. LaVallee, 251 F. Supp. 292, 296 (N.D.N.Y. 1966), aff'd 367 F. 2d 351 (2d Cir. 1966) (" ... the arresting officers had probable cause to believe that petitioner had committed the Times Square holdup described in the radio message"); United States ex rel. Williams v. LaVallee, 415 F. 2d 643, 645-646 (2d Cir. 1969). See also United States ex rel. Hollman v. Rundle, 461 F. 2d 758 (3rd Cir. 1972).

Even if the radio alarm was not sufficient to support an arrest, it was sufficient to support an investigatory stop. United States v. Hernandez, 486 F. 2d 614, 617 (7th Cir. 1973), and the patrolman's order to the occupants to come out of the car. The occupants came out and thereafter the officer pulled out the loaded revolver from underneath the driver's seat. At this point he obviously had probable cause for arresting appellant for possession of a weapon. In this connection the officer's action in feeling underneath the driver's seat with his hand did not infringe upon appellant's right to privacy. See Cardwell v. Lewis, ___ U.S. ___ 42 LW 4928, 4930 wherein it was recognized that some parts of a car are not constitutionally protected.

> " ... 'The search of an automobile is far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building.' Almeida-Sanchez v. United States, 413 U.S. 266, 279 (1973) (Powell, J., concurring). One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view. See People v. Case, 220 Mich. 379, 388-389, 190 N W 289, 292 (1922). 'What a person knowingly exposes to the public, even in his own home or office is not a subject of Fourth Amendment protection.' Katz v. United States,

389 U.S. at 351; United States v. Dionisio, 410 U.S. at 14. This is not to say that no part of the interior of an automobile has Fourth Amendment protection; the exercise of a desire to be mobile does not, of course, waive one's right to be free of unreasonable government intrusion. But insofar as Fourth Amendment protection extends to a motor vehicle, it is the right to privacy that is the touchstone of our inquiry."

## POINT III

APPELLANT HAS NOT EXHAUSTED STATE REMEDIES ON HIS FRUIT OF THE POISONOUS TREE CLAIM.

Appellant contends that the testimony as to the pre-trial identification should have been suppressed as fruit of an illegal arrest and detention. It does not appear that the contention has ever been raised in the state courts. The state courts have not had a fair opportunity to consider the claim and he has failed to exhaust available state remedies. United States ex rel. Gibbs v. Zelker, 496 F. 2d 991 (2d Cir. 1974); United States ex rel. Nelson v. Zelker, 465 F. 2d 1121, 1123-1125 (2d Cir. 1972); cert. denied 409 U.S. 1045 (1972); United States ex rel. DiGiangiemo v. Vincent, 489 F. 2d 1370, 1373-1374 (2d Cir. 1974); Mayer v. Moeykens, 494 F. 2d 855, 858-859 (2d Cir. 1974); United States ex rel. Johnson v. Vincent, 507 F. 2d 1309, 1311-1313 (2d Cir. 1974).

## CONCLUSION

THE ORDER APPEALED FROM SHOULD BE AFFIRMED.

Dated: New York, New York
April 18, 1975

Respectfully submitted,

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STATE OF NEW YORK )
: SS.:
COUNTY OF NEW YORK )

GLORIA KIRNON , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Appellee herein. On the 18th day of April , 1975 , she served the annexed upon the following named person :

David W. McCarthy, Esq.
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Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by them for that purpose.

Gloria Kirnon
GLORIA KIRNON

Sworn to before me this
18th day of April , 1975

Burton Herman
Assistant Attorney General
of the State of New York